

JAN 17 2006**NOT FOR PUBLICATION**

UNITED STATES COURT OF APPEALS

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

JOHN JOE LOPEZ,

Defendant - Appellant.

No. 04-17384

D.C. Nos. CV-04-01706-WBS
CR-01-00141-WBSMEMORANDUM^{*}Appeal from the United States District Court
for the Eastern District of California
William B. Shubb, District Judge, PresidingSubmitted January 9, 2006^{**}

Before: HUG, O'SCANNLAIN, and SILVERMAN, Circuit Judges.

John Joe Lopez appeals pro se from the district court's order denying his motion for a reduction of sentence. Because appellant's November 24, 2004, filing in the district court included a request for a certificate of appealability, we have

^{*} This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

^{**} This panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

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jurisdiction pursuant to 28 U.S.C. § 1291. *See Tinsley v. Borg*, 895 F.2d 520, 523 (9th Cir. 1990).

Appellant's claim raised in the district court regarding the applicability of *Blakely v. Washington*, 542 U.S. 296 (2004), to his sentence is foreclosed by *United States v. Cruz*, 423 F.3d 1119, 1120-21 (9th Cir. 2005) (per curiam). Accordingly, we affirm the district court's order.

It is not clear from the record whether the district court recharacterized appellant's pro se motion as a 28 U.S.C. § 2255 motion. If it did, then the district court failed to warn appellant "that this recharacterization means that any subsequent § 2255 motion will be subject to the restrictions on second or successive motions." *See Castro v. United States*, 540 U.S. 375, 383 (2003). Accordingly, we conclude that appellant's pro se motion, filed in the district court on August 16, 2004, cannot be considered to be appellant's first § 2255 motion for purposes of applying the restrictions on second or successive motions in the future. *See id.*

AFFIRMED.